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Supreme Court, U
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Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, *Petitioners*,

v.

STATE OF HAWAII, *ET AL.*

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

Brief *Amicus Curiae* of Citizens United, Citizens United Found., U.S. Justice Found., English First, English First Found., Public Advocate of the U.S., Gun Owners Foundation, Gun Owners of America, Inc., Policy Analysis Center, and Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, English First, Public Advocate of the United States, and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, United States Justice Foundation, English First Foundation, Gun Owners Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Several of these *amici* have worked on these issues for many years, including these in 2016-17: (i) a Legal Analysis of presidential candidate Trump's proposals to limit immigration from certain countries (Feb. 12, 2016); (ii) an *amicus* brief to the U.S. Supreme Court in support of a 26-State challenge to presidential executive actions that were clearly outside statutory authority (Apr. 4, 2016); (iii) Comments to the Department of State regarding the proposed number

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of refugees for 2017 (May 19, 2016); (iv) a Legal Policy Paper analyzing the constitutional authority for States to enter into an interstate compact regarding immigration (Sept. 2, 2016); and (v) Comments to the U.S. Citizenship & Immigration Service regarding amendments to the Registration for Classification as Refugee form (Nov. 17, 2016).

Additionally, these *amici* filed five previous *amicus* briefs in this case, in the Fourth Circuit, the Ninth Circuit, and in this Court at the petition stage:

- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Feb. 6, 2017);

- Washington v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Feb. 16, 2017);

- IRAP v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Fourth Circuit (Mar. 31, 2017);

- Hawaii v. Trump, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Apr. 21, 2017); and

- Trump v. IRAP, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (June 12, 2017).

STATEMENT OF THE CASE

During most of his administration, President Barack Obama promoted and implemented immigration policies which were highly controversial and divisive. Unable to persuade Congress to adopt his version of immigration law reform, comprehensive or otherwise, he asserted his belief that he was justified in implementing those failed legislative proposals administratively. *See* "Halting Obama's Immigration End-Run around Congress," National Review (May 28, 2015). President Obama defended his Deferred Action for Parents of Americans ("DAPA") program as an exercise of prosecutorial discretion, but it was challenged as a violation of his duty as President to "take care that the laws be faithfully executed." The DAPA program was enjoined by the federal judiciary for violation of the Administrative Procedure Act. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *aff'd by an equally divided Court sub nom.*, United States v. Texas, 136 S.Ct. 2271 (2016). Additionally, President Obama dramatically increased the number of refugees permitted to enter the United States from approximately 60,000 persons in FY 2008, to 85,000 persons in FY 2016 and, before leaving office, had approved a further increase to 110,000 persons for FY 2017.

Even senior officials within President Obama's Administration disputed the notion that adequate vetting of the immigrants and refugees he favored was possible. In a report prepared by the U.S. Department of Homeland Security ("DHS") during the Obama presidency, it was observed that: "**The immigration**

system is a constant target for exploitation by individuals who seek to enter the United States and who are otherwise ineligible for entry based on security grounds." *See* U.S. Department of Homeland Security, "Lack of Identity Documents in the Refugee Process" ("DHS Report") at 1 (emphasis added). The DHS Report further found that **"ICE's Refugee Program is particularly vulnerable to fraud** due to loose evidentiary requirements, where at times, the testimony of an applicant alone is sufficient for approval." *Id.* (emphasis added). According to this Obama Administration DHS Report, the problems with the vetting system were legion:

- the processing of refugees by DHS officers takes place in foreign refugee camps;
- vetting typically takes place in areas where it is difficult to verify claims;
- biometric tools such as DNA testing and fingerprinting are nonexistent;
- identity documents (with name and DOB) are frequently missing;
- attestations (such as former employers) are unreliable; and
- other supporting documents (medical, political activity, judicial papers) are frequently altered or counterfeited. [*See id.*]

As to the refugee program, the Obama Administration DHS Report admitted that "loose evidentiary requirements" allowed applicants to "exploit the system."

> The refugee and asylum laws purposefully contain **loose evidentiary requirements based** on the assumption that a true victim of persecution would not have the time or resources to obtain evidence of their persecution as they flee the country. This flexibility in the law, however, not only helps victims of persecution, it also allows others to **exploit the system**. [*Id.* (emphasis added).]

Because the DHS Report directly supported criticisms of immigration and refugee policy being made by candidate Donald Trump on the campaign trail, it is not surprising that the DHS memo was an internal one. The Report was made public by members of Congress concerned about "the number of refugees from dangerous countries."[2]

In November 2016, the People of these United States decided to chart a different course, electing Donald Trump as President of the United States, *inter alia*, to "build a wall" and "protect the nation from terrorism." As a first step to chart that new course, on February 1, 2017, newly elected President Trump issued an Executive Order designed to implement a pause on the policies of President Obama, as he sought

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[2] *Washington Times*, "DHS admits refugee fraud 'easy to commit,'" (Sept. 22, 2016). The *Washington Times* reported on DHS testimony that was elicited during hearings concerning President Obama's "'decision to increase overall refugee resettlement – and specifically that of Syrian refugees – ignor[ing] warnings from his own national security officials.'"

to staff a new Administration, and fashion new and improved immigration policies and practices.

After litigation ensued, the First Executive Order (No. 13,769 (Feb. 1, 2017)), was replaced by the Second Executive Order (Executive Order No. 13,780 (Mar. 9, 2017)) which is the subject of this litigation. This Second Executive Order imposed a temporary suspension ("a brief period of 90 days") of immigration from seven specifically named countries, for a specific purpose: to review "existing screening and vetting procedures were under review." *Id.*, Sec. 1(b)(ii). The Second Executive Order further explained that the First Executive Order had been "halted by court orders that apply **nationwide** and extend even to foreign nationals with **no prior or substantial connection** to the United States." *Id.*, Sec. 1(c). The Second Executive Order was narrowed, applying to six rather than seven specified countries, and repealing the preference for persecuted minority religions. Nevertheless, in subsequent litigation, the Fourth Circuit and the Ninth Circuit upheld broad injunctions to the Second Executive Order that applied well beyond the plaintiff parties to these cases, were nationwide in scope, and even applied to individuals in other countries with no nexus to the United States.[3]

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[3] As explained by Judge Neimeyer, the Executive Order was a "modest action ... which imposes only a temporary pause of 90 days to assess whether the screening and vetting procedures that are applied to nationals from these high-risk countries are adequate to identify and exclude terrorists. Even this pause is accompanied by an authorization to issue waivers designed to limit any harmful impact without compromising national security." IRAP at 649 (Neimeyer, J., dissenting).

The Fourth Circuit affirmed a nationwide injunction of the implementation of Section 2(c) of the Second Executive Order. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (2017) ("IRAP"). Similarly, the Ninth Circuit upheld a nationwide order enjoining both Sections 2 and 6 of the Order. Hawaii v. Trump, 859 F.3d 741, 755 (2017). Both the Maryland and Hawaii district court judges actually went so far as to enjoin the President himself.[4] The Government briefs below challenged the legitimacy of an injunction against the President, and these *amici* briefed the impropriety of such an injunction at some length in both courts.[5] To their credit, both the Fourth and Ninth Circuits reversed this aspect of the district courts' injunctions, recognizing that courts generally lack jurisdiction to enjoin the President. *See* IRAP at 99; Hawaii at 788. Nonetheless, in issuing virtually unprecedented injunctions against the President of the United States, unelected district judges demonstrated their willingness to jettison traditional limitations on the injunctive power of the federal courts, in order to stop the newly elected President of the United States

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[4] The almost unprecedented act of naming President Trump in the lawsuit is consistent with strategies and tactics taught by Saul D. Alinsky, the subject of Hillary Clinton's Wellesley thesis, who counseled: *"[p]ick the target, freeze it, personalize it, and polarize it....* [A] target ... must be a personification, not something general and abstract...." S. Alinsky, Rules for Radicals (Vintage Books: 1971) at 130, 133.

[5] *See* Brief *Amicus Curiae* of United States Justice Foundation (Mar. 31, 2017), IRAP v. Trump at 22-28; Brief *Amicus Curiae* of United States Justice Foundation (Apr. 21, 2017), Hawaii v. Trump at 23-30.

from implementing the political agenda which drove his election by the People.

SUMMARY OF ARGUMENT

In support of their claim that the President's Order is a forbidden by the Establishment Clause the plaintiffs have alleged only that the Order "disfavors" the Islamic religion. According to this Court's precedents, however, the Establishment Clause applies only to government actions that "advance" religion, not actions that only "disfavor" a religion as pled here. Therefore, the courts below erred by addressing Plaintiffs' Establishment Clause claim on the merits, instead of dismissing that claim on the sole ground that Plaintiffs have failed state a claim upon which relief can be granted.

The Ninth Circuit decision differed from that of the Fourth Circuit because it was based on statutory interpretation — not the Establishment Clause. The Ninth Circuit demonstrated that it fundamentally misunderstood the scope of the President's authority over immigrants and refugees. The Ninth Circuit assumed that the President had neither inherent authority over immigration as the Chief Executive Officer of a sovereign nation, nor constitutional authority over immigration, as President except for what powers Congress may have delegated. In truth, the scope of that delegation of Congressional powers under 8 U.S.C. § 1182(f) could neither have been more broad nor more clear. According to Justice Robert Jackson's famous concurrence in Youngstown Sheet and Tube Co., in issuing his Executive Order,

President was operating at the zenith of his powers. That statute has been employed by Presidents of both parties for decades without successful challenge in federal court — until now. The injunctions below violated his Court's holding in Kleindienst v. Mandel. Moreover, even in the absence of statutory power, the position of the President requires that he protect the nation's borders. Lastly, the Ninth Circuit erroneously assumed the federal power over immigration is based in the constitution's naturalization clause, and those powers are vested only in Congress, but, as recognized by this Court for over a Century, the power of a nation to control its own borders is inherent in sovereignty.

As to the admission of refugees, the President's authority under federal law is equally clear. The Ninth Circuit accepted the bogus legal theory that President Trump was bound by the actions of a prior President designating the number of refugees that would be admitted in the fiscal year after he left office. The Ninth Circuit's statutory analysis was creative, but deeply flawed. Its effect was to negate the choice made by the American People in electing President Trump, and to continue a refugee admissions policy that even the Obama Administration understood was deeply flawed and susceptible to abuse. The Obama Administration even attempted to revise the refugee application form to omit key information necessary to demonstrate whether applicants meet the statutory test of being persecuted on the basis of race, religion, nationality, or membership in a social group or political opinion.

The Fourth Circuit's opinion not just sought to second guess the decision of the President in an area involving national security, but sought to psychoanalyze him, and then demonize him. The Fourth Circuit felt free to disregard the Executive Order's national security foundation because it perceived "drips with religious intolerance, animus, and discrimination." A finding of animus in the political branches is enormously helpful to a federal judge who seeks to impose his own policy preferences on the nation. A finding of animus gives an unelected judge the excuse to demean the officials elected by the people, disregard their positions the responsibilities, and frustrate and impede their actions. Indeed, both circuit courts violated the warning of Chief Justice Warren Burger, who instructed that "the Judiciary always must be hesitant to prove into the elements of Presidential decisionmaking." The Chief Justice Burger offered many reasons for that policy, not the least of which is that it could encourage the political branches "to probe into judicial decisionmaking." Particularly in a case where one of the counsel for respondents has conceded that the same Executive Order issued by a different President would have been unobjectionable, the courts should avoid imputing improper motives to a coordinate branch of government.

ARGUMENT

I. THE "NO ESTABLISHMENT" CLAUSE DOES NOT PROHIBIT GOVERNMENT "DISFAVORING" RELIGION AS PLED AND ARGUED HERE.

A. Respondents' Establishment Clause Claim Rests Solely on the Allegation that the Executive Order Disfavors the Muslim Religion.

In the IRAP litigation in the Fourth Circuit, the three respondents complained that the President's Executive Orders violated the Establishment Clause because the President was motivated by an "anti-Muslim" sentiment to disfavor the Islamic religion by sending a "'state-sanctioned message condemning [that] religion.'" Brief for the Petitioners ("Pet. Br.") at 13. The district court agreed, holding that the President's Order was "adopted for an improper 'religious purpose' of preventing Muslim immigration" and, upon that ground, entered a global preliminary injunction barring any enforcement of Section 2(c). Pet. Br. at 12. The Fourth Circuit affirmed, concluding that the president's order was based on "bad faith and was 'motivated by a desire to exclude Muslims from the United States,'" in violation of the Establishment Clause.[6] *Id.* By these actions, both the district court and court of appeals below endorsed the respondents' theory expressed in their complaint that the Establishment Clause was implicated by the expression of "anti-Muslim" views and attitudes "disfavoring" the respondents' religion.

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[6] In the Hawaii litigation in the Ninth Circuit, the district court held that "religious animus dr[ove] the promulgation of [President Trump's] Order," but did not reach the Establishment Clause issue, deciding that the president's authority exceeded that which Congress had granted him by statute. Hawaii at 761.

B. The Establishment Clause Does Not Support Any Claim Based on Government Action That Does Nothing More than "Disfavor Religion."

The Government Brief enumerates a number of reasons why the President's Order limiting entry from Muslim majority countries into the United States does not violate the Establishment Clause. *See* Pet. Br. at 62-78. While the Government Brief is, on the whole, persuasive, it was mistaken to have stated that the Establishment Clause is "implicated" by government action, the "'official objective' [of which] **favor[s] or disfavor[s]** religion."[7] Pet. Br. at 70 (emphasis added).

The very pinpoint citation relied upon by the Government does not support its concession that acts "favoring or disfavoring" a religion equally implicate the Establishment Clause. One will search in vain page 862 of McCreary County v. ACLU, 545 U.S. 844 (2005), for any statement supporting the Government's claim. Rather, the issue addressed in McCreary concerns the legitimacy of the judicial inquiry into **purpose** generally in Establishment Clause cases, not into the particular kind of **purposes** required. As for the particular purpose inquiry that is required, the Court had already addressed the issue in the immediately preceding pages. In those two pages, there is no language to support the claim that action

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[7] Here, the Government proves the aphorism attributed to Mark Twain: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

"favoring or disfavoring religion" equally implicates the Establishment Clause.

To the contrary, the McCreary Court states that "[w]hen the government acts with the ostensible and predominant purpose of **advancing religion**, it violates that **central** Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *Id.* at 860 (emphasis added). Immediately following this statement of principle, McCreary explains further, quoting from Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987):

> Lemon's "purpose" requirement aims at preventing [government] from ... acting with the intent of **promoting** a particular point of view in religious matters... [McCreary at 860 (emphasis added).]

Then, in further explanation, McCreary states that "[b]y showing **a purpose to favor** religion, the government sends the ... message to ... nonadherents that they are outsiders, not full members of the political community...." *Id.* (emphasis added) (internal quotation marks omitted).

C. There Is No Such Thing as a Hybrid Establishment/Free Exercise Claim.

Not only does McCreary not support the respondents' claim that the Establishment Clause is equally implicated by actions favoring and disfavoring

religion, it acknowledges that the two religion guarantees pose different questions requiring different analyses. As this Court explained in Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993):

> [Establishment Clause] cases ... for the most part have addressed governmental efforts to **benefit** religion or particular religions, and so have dealt with a question different ... in its formulation and emphasis, from [a claim based upon] an attempt to **disfavor** their religion because of the religious ceremonies it commands [where] the Free Exercise Clause is dispositive.... [*Id.* at 532 (emphasis added).]

As the McCreary Court itself pointed out, Lukumi required only evidence of a "discriminatory purpose" to support a Free Exercise claim that a city ordinance unconstitutionally singled out for punishment the conduct of a religious ceremony (*id.* at 862), whereas in Epperson v. Arkansas, 393 U.S. 97, 102-103 (1968), the constitutionality under the Establishment Clause of a state statute singling out the teaching of evolution required evidence of a "predominant purpose of advancing religion." *See* McCreary at 860.

Notwithstanding this distinction, respondents alleged in paragraph 221 of their Complaint that the President's Order "violates the Establishment Clause by singling out Muslims for disfavored treatment [for] the purpose and effect of inhibiting religion, and it is neither justified by, nor closely fitted to, any compelling governmental interest." In Lukumi, the

Supreme Court stated that the Free Exercise Clause requires proof of a "compelling governmental interest," and proof that it is "narrowly tailored," but only if the challenged law is not "neutral and of general applicability." *Id.* at 531. Shoe horning the religious freedom claim into a Free Exercise mold, the Complaint alleges that the President's Order "singl[es] out Muslims," and thus, the President's Order must be "closely fitted" to a "compelling governmental interest." Complaint Para. 221. However, the respondents here have brought their claim as an Establishment Clause one, not a Free Exercise one. The Court in Lukumi acknowledged that an Establishment Clause claim poses a "question different ... in its formulation and emphasis." Lukumi at 532. Typically, an Establishment Clause claim is governed by a three-part test designed to ferret out those government actions that "advance" religion — not actions that "disfavor" religion. *See* Lemon v. Kurtzman, 403 U.S. 602 (1990).

Oddly, in this case the respondents have pled an Establishment Clause claim, but urged the courts to apply the Lukumi Free Exercise test. *See* Pet. Br. at 70-71. And most noteworthy, the Government thus far has let them get away with it, having indicated in its opening brief that the validity of the President's Order be tested by the Free Exercise guarantee of nondiscrimination!

As these *amici* stressed in their brief in support of the Government's Petition for Certiorari, the distinction between a government act favoring religion and one disfavoring religion is not a semantic one, but

one of constitutional dimension. The two rights — No Establishment and Free Exercise — are different. As Justice Joseph Story put it in his Commentaries, the Establishment Clause addresses the limits to which the government may rightly go in "fostering and encouraging religion," whereas the Free Exercise Clause sets the jurisdictional line protecting the people from civil government intrusion upon duties owed exclusively to God. *See* 2 J. Story, Commentaries on the Constitution, Sections 1872-77, at 630-32 (Little, Brown: 5th ed. 1891).

Having failed to allege that the predominant purpose of the President's Order was to "advance" a religion, the plaintiffs' Establishment Clause claim should be dismissed on the ground that they failed to state a cause of action upon which relief can be granted.[8] Further, any effort that the respondents might make at this stage of the proceedings to amend their Complaint and transform their Establishment claim into a Free Exercise claim should be rejected as untimely and prejudicial. *See* Rule 15(b)(1), FRCivP. The respondents should not be allowed to cherry pick from the two religion guarantees to reach their desired result.

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[8] *See* Rule 12(b)(6), FRCivP.

II. THE NINTH CIRCUIT FUNDAMENTALLY MISAPPREHENDED THE PRESIDENT'S POWER OVER THE ADMISSION OF IMMIGRANTS AND REFUGEES.

The Ninth Circuit bases its decision on a fundamental misunderstanding of the basis for the President's authority to restrict admission of immigrants and refugees to the country. The Ninth Circuit begins its analysis as to whether "EO2 violates the INA," with the statement:

> Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress." *Galvan v. Press* [347 U.S. 522, 531 (1954)]; see U.S. Const. art I. §8, cl. 4...; *Fiallo v. Bell* [430 U.S. 787, 792 (1977)] ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." .... In the INA of 1952, Congress delegated some of its power to the President through Section 212(f).... [Hawaii at 769.]

The unstated assumption of this analysis is that the President has neither constitutional nor inherent authority to control entry by foreigners into the United States — only limited delegated congressional authority. Not only is this untrue, but also none of the three authorities relied on by the Ninth Circuit support this proposition.

The first case cited, Galvan v. Press, addressed the meaning of the term "member"as used in the Internal

Security Act of 1950 with respect to members of the Communist Party. The case involved the Executive's deportation of an individual pursuant to the authorization of Congress. This Court simply refused to find that a challenged deportation violated the due process clause, on the ground that "the formulation of [immigration] policies is entrusted exclusively to Congress..." explaining that "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government...." Galvan at 531. The Court did not decide, or even discuss, the differences between the roles of the Executive and the Legislative Branches in governing immigration.

As to the second authority cited, Article I, Section 8, Clause 4 of the Constitution only addresses the issue of the naturalization of citizens — and provides no basis for the federal government's power to regulate the admission of aliens and refugees into the country. Failure to provide an express power over immigration was not an oversight by the Framers, because no nation needs to be granted an enumerated power to exercise the foundational power of a sovereign nation — the power to enforce borders by controlling the entry of aliens. As this Court explained in Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893):

> It is an accepted maxim of international law, that every sovereign nation has the power, as **inherent in sovereignty**, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such

> conditions as it may see fit to prescribe. [Emphasis added.]

Although at various times in the past, some have sourced the federal government's power over immigration to its enumerated power to regulate foreign commerce, and here it was sourced to the naturalization power, it is generally understood that:

> Congress does not derive its power to regulate immigration from a specific constitutional grant[,] [but] [i]t is simply regarded as a power **inherent to a sovereignty**. [J. Nowak, R. Rotunda & J. Young, Constitutional Law, § 14.11, p. 628, n.16 (3d ed., West: 1986) (emphasis added).]

As to the third authority cited, the Ninth Circuit quotes language from Fiallo v. Bell, that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admissions of aliens." Fiallo at 792. But again, in no way does that language address the relative roles of Congress and the President with respect to the immigration power. Rather, this Court denied a challenge by unwed natural fathers and their illegitimate offspring to the constitutionality of a section of the Immigration and Nationality Act of 1952 that was being enforced by the Executive Branch. The Fiallo Court identified the three factors governing this area of the law — including the role of the judiciary — all of which were ignored by the Ninth Circuit:

> Our cases "have long recognized the power to expel or exclude aliens as [i] a fundamental **sovereign** attribute [ii] exercised by the Government's **political departments** [iii] largely **immune** from judicial control. [*Id.* at 792 (emphasis added) (citations omitted).]

In Fiallo, as in Fong Yue Ting more than a century earlier, this Court recognized control over immigration into the country to be an inherent attribute of sovereignty. And the second and third points made by the Court in Fiallo must be considered together. The power to expel or exclude aliens is vested in what this Court called "the Government's political departments," making it, by definition, a power not to be exercised by the judiciary. Indeed, the Court in Fiallo went on to elaborate that "the power over aliens is of a political character and therefore subject only to narrow judicial review." Fiallo, at 792 (citations omitted).

In Fiallo, as below, the plaintiffs claimed that they did "not challenge the need for special judicial deference" to immigration policy, "but instead suggest that a 'unique coalescing of factors' makes the instant case sufficiently unlike prior immigration cases to warrant more searching judicial scrutiny." Fiallo at 793. Indeed, it would seem that every case presents a "unique coalescing of factors" by which litigants seek to carve out an exception to the governing rule — but it is the role of the court to apply the rule, even if judges would personally prefer a different outcome.

As in Fiallo, the President here was acting pursuant to an express delegation of virtually

unreviewable authority to make a finding and issue a proclamation to implement a Congressional purpose. Indeed, here the Immigration and Nationality Act unquestionably empowered the President to issue his Second Executive Order, unhindered:

> Whenever the President finds that the **entry** of any aliens or of any class of aliens into the United States **would be detrimental** to the interests of the United States, he **may by proclamation**, and for such period as **he shall deem necessary**, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions **he may deem** to be **appropriate**. [8 U.S.C. § 1182(f) (emphasis added).]

Clearer language of unqualified delegation of authority to the President could not have been written. Given this clear Congressional authorization, Justice Jackson's familiar concordance in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), explains how this Court should assess the Second Executive Order issued by President Trump:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said ... to personify the federal sovereignty. If his act is held unconstitutional under these

> circumstances, it usually means that the Federal Government as an undivided whole lacks power. [*Id.* at 635-37.]

Lastly, as a power inherent in a sovereign nation, the President would have authority even in the absence of statute. And it is abundantly clear that, with respect to setting of immigration policy, there is no role whatsoever for the Judiciary to play.

Starting from a flawed premise about the President's lack of inherent and constitutional authority, the Maryland district court devised a theory to justify an injunction that stopped the President in his tracks. As Judge Neimeyer explained in his dissent to the IRAP decision, in issuing its injunction, the Maryland court seriously erred by refusing to apply this Court's holding in Kleindienst v. Mandel, 408 U.S. 753 (1972), fabricating a new proposition of law that campaign statements may be considered, and by radically extending Establishment Clause precedents. The majority, he writes, "grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited.... The majority, now for the first time, rejects [three Supreme Court opinions] in favor of its politically desired outcome." IRAP at 648 (Niemeyer, J., dissenting). The Fourth Circuit's decision, based on its understanding of the statutory scheme, cannot stand.

III. CREATIVELY INTERPRETING THE LAWS GOVERNING REFUGEES, THE NINTH CIRCUIT REWRITES THE LAW TO SUIT ITS POLITICAL AGENDA.

Sections 6(a) and (b) of the Second Executive Order temporarily suspended refugee admission for a period of 120 days, and then reduced the cap on total refugees for FY 2017 from 110,000 to 50,000. In upholding the injunction against these provisions, the Ninth Circuit rejected the President's claims of authority under both 8 U.S.C. § 1182(f) and 8 U.S.C. § 1157. Hawaii at 741. Section 1182(f) provides the President broad, unilateral, and virtually unreviewable[9] power to suspend "by proclamation" the entry of any alien whenever he finds such entry "would be detrimental to the interests of the United States." Section 1157 establishes a system where the President would establish the number of annual refugees, and a specific mechanism to increase the annual cap — but in no way does that statute mandate the admission of even a single refugee, instead always discussing those refugees who "may be admitted." (Emphasis added.) The government argues that "the Ninth Circuit's ruling rests on a fundamental misunderstanding of the

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[9] In addition to outright suspension of the admission of any class of aliens, including refugees, § 1182(f) permits the President a further option — to "impose on the entry of aliens **any restrictions he may deem to be appropriate.**" This language clearly does not authorize judicial second-guessing. Why, then, would a direct suspension of aliens be reviewable by the Ninth Circuit, if an indirect suspension of aliens (through imposition of "restrictions") is not to court review?

[refugee] statute...." Govt. Br. at 38. That is putting it mildly, for the reasons set out below.

The Ninth Circuit ignored the clear and unambiguous text of both of these statutes, declaring not "what the law is" but asserting its policy preferences. The court rejected the determination of President Trump, mandating that this country return to the refugee policies that "[former] President Obama previously determined...." Hawaii at 775, 780.

A. Section 1182(f) Does Not Require that the Ninth Circuit Agree with the President's Findings.

As to § 1182(f), the Ninth Circuit claims that there is a "statutory precondition of [the President] exercising his authority under § 1182(f)...." Indeed, § 1182(f) "requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States." Hawaii at 770. But nothing in § 1182(f) requires the President to detail the basis for his facially sufficient finding to the satisfaction of the Ninth Circuit or any other court. Yet the Ninth Circuit reads into the statute the requirement that the President not only "find," but that he make a "sufficient finding," satisfactory to the court. Hawaii at 776.

As Petitioners' Brief explains, this "allows for impermissible judicial second-guessing of national-security determinations made by the President." Govt. Br. at 38-39. Indeed, the Ninth Circuit's opinion second-guesses not only the President's determination,

but also the decision by Congress to delegate broad powers to the President. Reading into a federal statute a broad requirement of judicial review, three lower court judges on the Ninth Circuit — all three appointed by Democrat President Clinton — seek to override the decisions of not one, but two, other branches of government, both of which currently happen to be controlled by elected Republicans.

B. Section 1157 Is Not a One Way Ratchet.

The Ninth Circuit badly "misunderstands" § 1157 as well. As the court notes, § 1157(a)(2) provides a mechanism whereby the President can determine the number of refugees "who may be admitted" for the following year.[10] Hawaii at 780. And, as the Ninth Circuit points out, "in 2016, President Obama determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified...." *Id.* According to the Ninth Circuit, the statute "does not provide a mechanism for the President to *decrease* the number of refugees to be admitted mid-year." *Id.* In other words, President Obama's policies constrain President Trump's actions, long after President Obama has left office. While laws and regulations carry over between administrations,

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[10] Contrary to the Ninth Circuit's assertion that "[t]he statute requires the President to set the number of annual refugee admissions ... before the start of the new fiscal year" (*id.* at 780), it is not at all clear from the statute that the President is required to do anything **unless** he intends to exceed the statutory cap of 50,000 refugees. *See* Govt. Br. at 61 (quoting a House Report that "consultation with Congress with respect to numbers of refugees admitted is only required when the [statutory] limit is exceeded.").

neither executive policies nor executive actions may bind successor presidents and thereby frustrate the will of the American public who voted for change.

The Ninth Circuit's conclusion defies the rules of sentence structure for statutory interpretation. In § 1157(a)(2), the subject of the sentence is "number" and the prepositional phrase "of refugees who may be admitted" modifies the subject. The phrase "shall be" is the verb — what the number shall be the next fiscal year. But the "number" the next year is still "the number of refugees who may be admitted" — not the "number" which was designated by President Obama, meaning it is a permissive rather than a mandatory requirement. Section 1157(d) provides further evidence, stating that the President "shall report ... regarding the **foreseeable** number of refugees who will be in need of resettlement...." As the government notes, § 1157 "refers to a ceiling — not the floor...." Hawaii at 780. Instead, the lower court's interpretation excises the "may" and inserts a "shall," rewriting the statute to read that "the number of refugees who **shall** be admitted ... **shall** be such number as the President determines...." The Court's interpretation of the statute is illogical. It is on this "misunderstanding" of the statute that the Ninth Circuit's decision hangs with respect to the refugee provisions of the Second Executive Order.

Consider a situation where there were not enough applicants for refugee status in a given year to satisfy the number set the prior year by the President. Should the President take steps to disrupt the Middle East in an effort to create enough refugees to meet a

quota that satisfies the Ninth Circuit? Additionally, if the President's number set in a prior year is fixed in stone, as the Ninth Circuit argues, why would § 1157(a)(4) require that "the President shall enumerate ... the number of aliens who were granted asylum in the previous year" in a report to Congress. It would be entirely redundant for the President to choose 110,000 refugees to allow entry, and then later report the number that were allowed entry, if by law that would be exactly 110,000 refugees. The purpose of § 1157 is not to operate as a one-way ratchet to block reduction in the number of refugees who may be admitted. Rather, as the government points out, both the text and the context of § 1157 make it abundantly clear that "Congress wanted refugee admissions to be limited" (Govt. Br. at 60). The statute clearly does not require the admission of a minimum number of refugees.

C. The Ninth Circuit Has Thwarted the Will of the People.

President Trump was elected to fulfill a mission — to change federal immigration and refugee policy. In addition to building a wall along the southern border with Mexico to stem a ongoing human invasion, President Trump was elected to crack down on uncontrolled immigration from terror-prone regions of the Middle East and Africa. Part of that mandate, in turn, involved developing appropriate procedures to ensure that immigrants and "refugees" from those dangerous regions are sufficiently "vetted" prior to their entry. Although the American people, in electing President Trump, have chosen to chart a path to

implement the view of President Reagan that "A nation without borders is not a nation,"[11] the courts below apparently preferred the policies of President Obama and his Secretary of State Kerry who rejoiced at a commencement address that "You're about to graduate into a complex and borderless world."[12]

The Ninth Circuit (and other federal courts) have imputed religious intolerance to President Trump's policies. However, in doing so, these judges impugn not only the President, but the tens of millions of Americans who voted for him. Contrary to these judges' cloistered view that the only possible motivation is "animus" of one form or another, there are numerous good reasons to have strict controls over those foreigners — especially so-called "refugees" — who are permitted to enter this country.

First, at least when it comes to Syria, the United States has little information about so-called "refugees." Although the Obama Administration famously described Syrian refugees as nearly exclusively women

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[11] *See* Phyllis Schlafly, "Amnesty Isn't 'Reform' — It's Open Borders," Eagle Forum (Jan. 2004) https://www.eagleforum.org/psr/2004/jan04/psrjan04.html.

[12] P. Kasperowicz, "Kerry slams Trump's wall, tells grads to prepare for 'borderless world,'" Washington Examiner (May 6, 2016) http://www.washingtonexaminer.com/kerryslams-trumps-wall-tells-grads-to-prepare-for-borderless-world/article/2590596.

and children,[13] the long lines of refugees shown in television news broadcasts are overwhelmingly males in their twenties and thirties unaccompanied by women and children. Indeed, the American people can have no confidence that persons who claim to be Syrian refugees are, in fact, even from Syria.[14]

Second, it is important that this country's immigration policies admit only those persons willing to live peacefully in a constitutional republic. However, it appears that few emigrating from Muslim nations share American values. Many adhere to the religious and political system of Sharia law,[15] which is fundamentally incompatible with this nation's political system. Often, they fail to integrate into American society, as President Trump has noted: "Assimilation has been very hard. It's almost — I won't say nonexistent, but it gets to be pretty close. I'm talking

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[13] It has been reported that a State Department spokesperson told the press: "Military-aged males unattached to families comprise only approximately two percent of Syrian refugee admissions to date," https://www.buzzfeed.com/andrewkaczynski/state-department-only-2-of-syrian-refugees-in-us-are-militar.

[14] The United Nations acknowledges that refugees crossing the Mediterranean are from Syria, Afghanistan, Iraq, Pakistan, Iran, Nigeria, Gambia, Somalia, Cote d'Ivoire, and Guinea, and reports the number of men at 45 percent — well over the 2 percent estimated by President Obama.

[15] Bill Connor, "Muslims Not the Enemy: But Sharia Law is clear and present danger to America," Times & Democrat (Dec. 20, 2015).

about second- and third-generation.... [F]or some reason there's no real assimilation."[16]

Third, even though the past Administration refused to use the words "Muslim" and "extremist" in the same sentence, the reality is that Islamic extremist views pose a real and present threat to the United States.[17] Federal courts are ill-equipped to assess the dangers of terrorist attacks by those from certain other countries. The judgment of the President on such matters should not be second guessed.

Finally, there is little assurance that persons admitted as refugees actually meet the statutory test set out in 8 U.S.C. § 1101(a)(42). Indeed, the Obama Administration in November of 2016 proposed to "revise" the USCIS Form-590 refugee form in several important ways. As *amicus* United States Justice Foundation pointed out in comments to USCIS, the revised form would have failed to gather certain key information to ensure that refugee applicants fall into the statutorily required categories of those persecuted

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[16] *See* http://www.thedailybeast.com/trump-muslim-american-assimiliation-close-to-nonexistent.

[17] Islam is not only a religion — it also is a political system. *See* J. Tayler, "Ayaan Hirsi Ali Explains How To Combat Political Islam," *Quillette* (Mar. 31, 2017). Consider how the lower courts would constrain President Trump from responding to the threat of immigrants from a Muslim country where the 109 verses of the Quran which call Muslims to war against nonbelievers to achieve Islamic rule are generally believed. *See* "What Does Islam Teach about Violence," http://www.thereligionofpeace.com/pages/quran/violence.aspx.

on the basis of race, religion, nationality, or membership in a social group or political opinion.[18]

IV. FEDERAL JUDGES HAVE NO AUTHORITY WHATSOEVER TO PSYCHOLOGICALLY ANALYZE AN ELECTED PRESIDENT, AND PERCEIVING ANIMUS IN HIS HEART, TO ISSUE REMEDIAL ORDERS.

The Fourth Circuit decision was light on law, but heavy on politics. The self-aggrandizing language in its opening paragraph reveals more about the political views of the Fourth Circuit *en banc* court than it does about the legality of the Executive Order under review:

> The question for this Court, distilled to its essential form, is whether the Constitution, as the Supreme Court declared in *Ex parte Milligan*, remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with **vague words of national security**, but in context **drips with religious intolerance, animus, and discrimination**.... It cannot go unchecked when, as here, the President **wields** it through an **executive edict** that stands to cause **irreparable harm** to individuals across this

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[18] http://lawandfreedom.com/wordpress/wp-content/uploads/2016/11/Joint-Comments-to-DHS-USCIS-on-Refugee-Form-I-590.pdf.

nation. [IRAP at 572 (emphasis added) (citations omitted).]

A. The Courts Below Have Failed to Recognize the Primary Role of the President in Defending the Country.

The Fourth Circuit quite obviously viewed itself as the ultimate guardian of the Constitution against the actions of our nation's elected "rulers" — but never paused to consider the limitations that document imposed on unelected judicial "rulers." Indeed, the Fourth Circuit never seemed to doubt whether it had the right to look behind a facially valid Executive Order to psychoanalyze the President of the United States, and then to make what purports to be a finding of fact: that the President exhibited "religious intolerance, animus, and discrimination," and then to use that finding to assert its own will, negating the policies of the President.

The Fourth Circuit would have done well to consider that the President is the only official elected by all the People and that all of the executive power of the federal government is vested in him. Article II, Section 1. He is duty-bound to "take care that the laws be faithfully executed...." Article II, Section 3. Thus, the Constitution establishes the President of the United States as the nation's Chief Law Enforcement Officer.

The President is also empowered to serve as "commander in chief," and the power with the Senate to "make treaties" and to "appoint ambassadors" and

"other public ministers," which together make him primary in most matters of foreign policy. Finally, the President is the only federal official whose oath is set out in the Constitution:

> I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States. [Article II, Section 1.]

In issuing the Second Executive Order, the President was exercising his responsibility of preserving, protecting and defending the Constitution — a higher level of duty than the federal judiciary's limited duty "to support this Constitution...." Article VI. Yet, based on a judicial assertion of animus, the courts below have enjoined the President's actions to defend the nation and its Constitution.

Truly animus is one of the most powerful judicially invented tools, as it invites judges to negate the legitimate actions of the political branches in an act of judicial supremacy over the people. A finding of animus becomes the predicate for the exercise of an unbridled judicial power to strike down any legislative or executive action that does not conform to judicial will. In one of the most important challenges to the principle of separation of powers, Chief Justice Burger warned:

> the Judiciary always must be hesitant to **probe** into the elements of **Presidential**

> **decisionmaking**, just as other branches should be hesitant to **probe into judicial decisionmaking**. [Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring) (emphasis added).]

Unfortunately, the Fourth Circuit did not heed the Chief Justice, instead belittling the Executive Order's use of "vague words of national security," and melodramatically characterizing the President's action as one that "drips with religious intolerance, animus, and discrimination." IRAP at 572.

The correct approach to a case such as this is to evaluate the Executive Order for what it actually does, rather than what one district court judge — or even a majority of judges on a court of appeals — thought motivated it. As Justice Powell more specifically amplified in Nixon, "Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive...." Nixon at 756. The consequences of this Court sanctioning the approach taken here by the Fourth Circuit would "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Id.* at 756. If the Fourth Circuit's approach is sanctioned, there would be no stopping point: not only would motives be put on trial, but litigants would also be enticed to find some "forbidden purpose" to challenge the legality of any official act. The search for motive transforms the judicial process from an objective legal search for principles to a subjective

psychological search to determine the state of the mind.

The 2016 presidential election was waged, in part, as a battle between open-border internationalists aligned with Secretary Hillary Clinton who embrace even illegal immigration, and nationalists who aligned with President Donald Trump, who promised to enforce the nation's borders. It is not the role of federal judges to operate "behind enemy lines" as a left-behind army tasked with impugning the President and impeding his agenda. Yet, for example, in a concurrence, one of the circuit court judges, Judge James A. Wynn, remarkably concluded that the President's statutory authority to ban entry to "'all aliens or any class of aliens'" conferred no authority "to deny entry solely on the basis of nationality and religion." IRAP at 609, 613. Judge Wynn then demonstrated hostility to the President through use of intemperate language, including "religious animus" and "invidiously discriminatory." *Id.* at 612-13.

B. The Decisions of the Courts Below Open the Judiciary to What Chief Justice Burger Termed a "Probe into Judicial Decisionmaking."

The saying goes that "what is good for the goose is good for the gander." If the Fourth Circuit is correct — that evidence of animus voids a decision of the political branches — then, as Justice Burger warned, would that not invite a "probe into judicial decisionmaking" by the political branches? Nixon at 761. Indeed, the President of the United States, as a coordinate branch

of the federal government, would seem to have the same duty as the court, to examine the motives of the judges ruling on cases involving his authority, before determining whether to give deference to a judicial ruling. Indeed, when judges twist the Constitution and statutes of the nation so as to give effect to their political will, the judicial branch acts like a political branch of government, and ceases to have any legitimacy to order another co-equal branch of government to do anything.

For example, if the President were to determine that District Judge Chuang, who enjoined the Second Executive Order in Maryland, was agitated by the undoing of the work of a prior administration in which he served in a senior capacity, could the President conclude that the judge was motivated by his "animus" toward the current President and his policies? Should the judge's prior statements and acts be evaluated to determine if his service as Deputy General Counsel of the Department of Homeland Security from 2009 to 2014 colored his decision about an EO undoing the immigration policies of the last administration?[19] Can the judge's motives be discerned from the fact that, in his previous position, he reportedly "pursued policies that are diametrically opposed to those of President Trump [and from which] many legal scholars and political commentators ... suggest that the impartiality of Judge Chuang's ... ruling 'might reasonably be questioned'"? *Id.* Should the President then treat the

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[19] M. Leahy, "Impartiality of Federal Judge Who Blocked Trump EO May Be In Question," Breitbart (Mar. 21, 2017).

judge's novel and constitutionally unsupportable injunction as being invalid and unenforceable?[20]

Indeed, counsel for respondents conceded his challenge was grounded in "never-Trumpism" in oral argument before the Fourth Circuit:

> Judge Niemeyer: "If a different candidate had won the election and then issued this order, I gather you wouldn't have any problem with that?"
>
> * * *
>
> Counsel for Respondents Omar Jadwat: "Yes, your honor, I think in that case, it could be constitutional."

CONCLUSION

For the foregoing reasons, the decisions of the Fourth and Ninth circuit courts below should be reversed, and all injunctions should be vacated.

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[20] No challenges to similar Executive Orders issued by prior presidents have been successful. *See* "A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States," USJF Legal Policy Paper at 2-4 (Feb. 12, 2016).

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